

Appeal No. 2005AP87

Cir. Ct. No. 2004CV1499

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN EX REL. SCOTT A. HEIMERMANN,

PLAINTIFF-APPELLANT,

V.

FILED

**GARY R. MCCAUGHTRY, MARK W. CLEMENTS, JOHN
O'DONOVAN, JOHN DEHAAN, JOANNE SWYERS,
MICHAEL J. SULLIVAN, CINDY O'DONNELL, STEVEN B.
CASPERSON, STEPHEN M. PUCKETT, SAM SCHNEITER,
TIMOTHY DOUMA AND LYNDY J. SCHWANDT, JOHN DOE
AND JOHN DOE 2,**

**Dec. 15,
2005**

Cornelia G. Clark
Clerk of Supreme Court

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Deininger and Higginbotham, JJ.

This appeal raises several issues concerning the scope of our authority to sanction litigants for repetitive frivolous filings. We believe the Supreme Court should consider the case because of the policy questions implicit in the resolution of the State's request for sanctions.

Scott Heimermann, an inmate at Waupun Correctional Institution, commenced an action pursuant to 42 U.S.C. § 1983 in the circuit court. The State removed the case to federal court. The federal court dismissed the case without considering the merits because it had previously barred Heimermann from filing suit in the federal court until he paid sanctions imposed on him for filing frivolous

cases. Heimermann attempted to refile the case in the circuit court. The circuit court refused to consider the merits of the case on two grounds. The court decided to accord comity to the federal decision dismissing the case. The court also concluded that the case should be dismissed because Heimermann was attempting once again to litigate his underlying criminal conviction. Heimermann appealed. After he had filed his brief, the State moved to strike the brief, dismiss the appeal and for an order prohibiting any state court from accepting filings from Heimermann until he pays the \$13,250 in sanctions imposed on him in federal and state courts,¹ with an exception for cases in which the court determines Heimermann is in “imminent danger of serious physical injury.” See WIS. STAT. § 801.02(7)(d) (2003-04).²

Simply put, the question is whether we have the authority to do what the State asks: does this court have the power to restrict future filings *in the circuit court*? May this court (or the circuit court) refuse to accept for filing a case because of unpaid sanctions in a different case in any state court? May this court or the circuit court refuse to accept for filing a case because of unpaid sanctions in federal court?

¹ Heimermann was ordered to pay \$7,500 in sanctions by the circuit court under WIS. STAT. § 802.05 (2003-04) for failing to make a good faith inquiry into the facts and law before filing his case. See *Heimermann v. Kohler*, No. 98-3292, unpublished slip op. (WI App Aug. 1, 2000), a District I per curiam decision. On appeal, we upheld the order and imposed sanctions for filing a frivolous appeal. *Id.* Heimermann has also filed numerous frivolous lawsuits in the federal courts. See *Heimermann v. Litscher*, 337 F.3d 781 (7th Cir. 2003). As a result, he has been subjected to a series of fines and filing restrictions in the federal courts. *Id.* at 781 n.1 (citing *Heimermann v. McCaughtry*, No. 02-4033, unpublished slip op., (7th Cir. Feb. 4, 2003), as an example where a \$5000 sanction was imposed on Heimermann for repeated frivolous filings).

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

We have decided several cases in which we have restricted future filings due to repeated frivolous filings. In *State v. Casteel*, 2001 WI App 188, 247 Wis. 2d 451, 634 N.W.2d 338, we concluded that Casteel's appeal was frivolous and stated that we would accept no further filings from him unless he submitted by affidavit certain information that would allow us to determine whether the appeal had arguable merit. *Id.*, ¶¶25-26. We cited our inherent power to ensure that our court functions efficiently and effectively to provide the fair administration of justice, relying on *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 749-50, 595 N.W. 2d 635 (1999). *Casteel*, 247 Wis. 2d 451, ¶23. However, the scope of the restrictions we imposed on Casteel were narrowly drafted "to strike a balance between Casteel's access to the courts, the taxpayers' right not to have frivolous litigation become an unwarranted drain on their resources and the public interest in maintaining the integrity of the judicial system." *Id.*, ¶27. We did not issue a blanket prohibition on future filings as the State has requested in this case.

In *Puchner v. Hepperla*, 2001 WI App 50, 241 Wis. 2d 545, 625 N.W.2d 609, a published per curiam, we concluded Puchner's appeal was frivolous and ordered him to pay attorney's fees and costs under WIS. STAT. RULE 809.25(3)(a). *Id.*, ¶1. We barred Puchner from commencing in this court and in the circuit court actions arising from, or relating to or involving Hepperla until the costs, fees and reasonable attorney's fees were paid in full. *Id.*, ¶6. We cited our inherent power to ensure that our court functions efficiently and effectively to provide the fair administration of justice, relying on *City of Sun Prairie*, 226 Wis. 2d at 749-50, *Village of Tigerton v. Minniecheske*, 211 Wis. 2d 777, 785, 565 N.W.2d 586 (Ct. App. 1997), and *Minniecheske v. Griesbach*, 161 Wis. 2d 743, 748, 468 N.W.2d 760 (Ct. App. 1991). *Puchner*, 241 Wis. 2d 545, ¶¶7-8. Once

again, however, the restrictions imposed in *Puchner* were narrower in scope than the restrictions the State requests here: we barred Puchner from filing actions only against a particular person, Hepperla.

In addition to *Casteel* and *Puchner*, we have restricted future filings in several unpublished cases. In *Balele v. Wisconsin Personnel Commission*, No. 02-2377, unpublished slip op. ¶1 (WI App June 19, 2003), a District IV per curiam, the circuit court found the action to be frivolous, imposed \$1000 in attorney's fees as a sanction and barred Balele from filing any further employment actions until the sanction was paid. We affirmed the circuit court's decision restricting future filings until Balele paid the sanction imposed on him, relying on *Minniecheske* and *Puchner*. *Balele*, No. 02-2377, ¶10. Unlike the sanctions requested here, the restriction on future filings by Baele in the circuit court was imposed by the circuit court.

In *Elkins v. Schneider*, No. 03-0252, unpublished slip op. ¶1 (WI App Mar. 10, 2004), a District II per curiam, we concluded the appeal was frivolous. We directed the clerk of this court to not accept any further appeals brought by Elkins against Schneider unless Elkins first obtained leave of this court to proceed with the appeal. *Id.* We relied on *Minniecheske* and *Puchner*. *Elkins*, No. 03-0252, ¶21. *Elkins* differs from this case because Elkins could obtain leave to proceed. *Elkins* also differs because the restriction barred Elkins from bringing civil appeals involving a particular person, Schneider.

In *State v. Gast*, No. 03-3182, unpublished slip op. ¶1 (WI App Aug. 3, 2004), a District III per curiam, we decided not to review the merits of Gast's arguments because the action was procedurally barred by *State v. Escalona-Naranjo*. 185 Wis. 2d 168, 517 N.W.2d 157 (1994). We imposed

sanctions, requiring Gast to submit an affidavit addressing several items before future filings in either this court or the circuit court. ***Gast***, No. 03-3182, ¶4. We directed the clerk of this court and the clerk of the circuit court to return unfiled any petition or motion not including the affidavit and supporting documents and explained that, after reviewing the documents, either this court or the circuit court would determine whether Gast could proceed. ***Id.*** This case, too, did not involve a blanket prohibition.

We certify this appeal for the Supreme Court to determine the scope of our inherent power to restrict future filings as a sanction for repeated frivolous filings. The State has moved for the imposition of sanctions that exceed in scope sanctions we have previously imposed. We seek guidance on whether and the extent to which we may restrict filings *in the circuit court* based on our inherent power. We also question whether we may refuse to accept a filing and restrict future filings until sanctions imposed in unrelated prior cases in the state and federal courts have been paid. In short, do we have the authority to do what the State asks?

